

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW JERSEY

3  
4 IN RE: VALSARTAN PRODUCTS  
5 LIABILITY LITIGATION

CIVIL ACTION NUMBER:

19-md-02875

6 MOTIONS

Via Zoom Videoconference

7 Mitchell H. Cohen Building & U.S. Courthouse  
8 4th & Cooper Streets  
9 Camden, New Jersey 08101  
June 23, 2023  
Commencing at 11:00 a.m.

10 B E F O R E:

THE HONORABLE THOMAS I. VANASKIE (RET.)  
UNITED STATES SPECIAL MASTER

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1 (PROCEEDINGS held via Zoom Videoconference before  
2 The Honorable Thomas I. Vanaskie (Ret.), United States Special  
3 Master, at 11:00 a.m.)

4 JUDGE VANASKIE: We are here to entertain argument on  
5 two discovery issues, two fairly well-identified issues and  
6 well-briefed issues; one dealing with the form of production of  
7 information dealing with the sale of VCDs, valsartan-containing  
8 drugs, and amounts paid to third-party payors; and then another  
9 issue dealing with whether production from royalty card  
10 databases should be required.

11 So, Ms. Kapke, are you ready to proceed?

12 MS. KAPKE: Yes, Your Honor.

13 JUDGE VANASKIE: All right.

14 MS. KAPKE: I think --

15 JUDGE VANASKIE: And then we will hear from Mr.  
16 Stanoch.

17 MS. KAPKE: I think the first issue is pretty well  
18 teed up in the briefs. We have not yet seen any articulation  
19 from plaintiffs why they need this data in the individualized  
20 form and we do have significant concerns about presenting it  
21 en masse to the TPPs themselves. That can cause significant  
22 competitive harm. And the only explanation for why plaintiffs  
23 want this data is, well, it exists so you have to give it to  
24 us. So we think we proposed a very reasonable solution that  
25 says, look, we will give it to you but we will aggregate it.

1 And plaintiffs haven't really articulated to us why they want  
2 it on that individualized patient-by-patient basis.

3 So I think that summarizes the issue pretty concisely  
4 for us.

5 JUDGE VANASKIE: Have you provided an evidentiary  
6 foundation for the competitive concerns you articulate in your  
7 papers?

8 MS. KAPKE: Yes, we have. Those were in the initial  
9 declarations that we submitted and they -- we didn't submit  
10 them with the reply but we did submit them in -- I'll give you  
11 the exact link.

12 JUDGE VANASKIE: Perfect.

13 MS. KAPKE: So it's 479- and then there's a series of  
14 affidavits. So I'll just read from the declaration of E.K.  
15 McCoy.

16 "Retail pharmacies compete with each other to provide  
17 services to plans and be considered in network for those plans.  
18 Because of the competitive nature of the retail pharmacy  
19 business in the US, the reimbursement amount that CVS receives  
20 for each prescription is a closely guarded trade secret."

21 And then one from M. Mistarz that we quoted in our  
22 brief at 479-10: "Other retail pharmacy defendants could gain  
23 a significant competitive and economic advantage over  
24 Walgreen's if they learned this confidential information and  
25 especially what each TPP reimburses Walgreen's for dispensing

1 generic drugs to the TPP's beneficiaries and members." And  
2 those are just two samples.

3 At ECF 479 we have affidavits from I think every  
4 single pharmacy defendant in this case indicating the  
5 significant harm here.

6 JUDGE VANASKIE: All right. Let's hear from Mr.  
7 Stanoch then on this issue.

8 Why do you need the transaction-by-transaction,  
9 prescription-by-prescription data?

10 MR. STANOCH: Good morning, Your Honor. David  
11 Stanoch --

12 JUDGE VANASKIE: Good morning.

13 MR. STANOCH: -- for the plaintiffs.

14 We need it for damages, Your Honor, plain and simple.  
15 We know this disaggregated data exists, they admit it exists,  
16 there's no dispute that it's relevant, and Your Honor heard  
17 defendants, through Mr. Ostfeld, argue for the last six months  
18 about how important it was for them to get disaggregated data  
19 from MSP regarding certain subsidies and reimbursements and  
20 other issues so that they can have a more accurate damages  
21 model. It's the same issue we're looking at here, Your Honor.  
22 The data exists in the exact same pharmacy databases they are  
23 pulling the name, address, birth date, and telephone number,  
24 they've already pulled the co-pay, we got that already, and  
25 it's right there in the records and this would be information

1 that's highly relevant to us to having the most accurate,  
2 robust damages model we can.

3 JUDGE VANASKIE: How do we address the competitive  
4 concerns that have been raised?

5 MR. STANOCH: I'd say a couple things to that,  
6 Your Honor. Number one, we have a protective order obviously  
7 in this case for years. Your Honor allowed MSP to produce what  
8 it vehemently argued was hypersensitive, hyper-commercially  
9 sensitive information as well, and Your Honor found the  
10 protective order sufficient for purposes of that disclosure.  
11 We've had a number of other data points produced by all manner  
12 of entities and persons here, and the protective order has been  
13 adequate in every instance in terms of businesses' competitive  
14 information and pricing, in terms of the cost of API in  
15 prescription drugs, in terms of individual plaintiff's very  
16 sensitive psychiatric records, even though this is a personal  
17 injury case not involving a psychiatric drug. In all instances  
18 that's come before Your Honor or Magistrate Judge Schneider or  
19 Judge Kugler it's been found that the protective order is  
20 sufficient.

21 The only competitive concerns I heard this morning,  
22 Your Honor, was about retailers themselves gaining some sort of  
23 advantage. They can make any agreement they want not to look  
24 at each other's data, Your Honor. I imagine they're not.  
25 Under the protective order, I think only outside counsel would

1 be looking at it anyway. So I don't really see the issue there  
2 in terms of competitive harm.

3 Their letter makes reference to competitive harm with  
4 consumers but, Your Honor, I mean, every one of us can get our  
5 pharmacy records, and we put the examples in, consumers can  
6 clearly see the amounts their own TPPs paid in their own  
7 pharmacy records.

8 And in terms of TPP competitive advantage, the only  
9 parties here, named parties, are MSP and Mata, and, again,  
10 under the protective order already, only the outside counsel  
11 can see it so there's no risk of Mata, which is a nonprofit  
12 that's using an administrator anthem anyway, and MSP, which is  
13 not the underlying assignors anyway, seeing the data and  
14 gaining some advantage, I think that's speculative at best.

15 JUDGE VANASKIE: Ms. Kapke, why isn't the "for outside  
16 counsel's eyes only" protective order sufficient?

17 MS. KAPKE: I think there's a risk of disclosure even  
18 beyond the protective order terms, even inadvertent, has our  
19 clients concerned.

20 JUDGE VANASKIE: But that's a speculative basis for me  
21 to withhold -- to say you can aggregate the information as  
22 opposed to providing it.

23 MS. KAPKE: Well, I think it's a matter of balancing  
24 plaintiffs' need. And I still haven't heard plaintiffs  
25 articulate a need. They're saying we need this but they're

1 getting -- they would be getting, under our proposal,  
2 aggregated data by month, four quarters, on payments, and  
3 that's what they need for damages. I don't see why they need  
4 that individualized and our clients have concern about the  
5 protective order. I understand Mr. Stanoch's point about the  
6 protective order giving some, some assurances; but our clients  
7 view this as very, very confidential information and they're  
8 concerned that the protective order just isn't enough.

9 JUDGE VANASKIE: Mr. Stanoch, why do you need the  
10 information on a transaction-by-transaction basis as opposed to  
11 aggregated data?

12 MR. STANOCH: We need it for, as I said earlier, for  
13 our damages modeling, Your Honor. Our experts are entitled --

14 JUDGE VANASKIE: Can you be more specific on that?

15 MR. STANOCH: Well, as Mr. Ostfeld has argued to this  
16 Court before over the last six months as to MSP's data, the  
17 disaggregated data provides the most accurate picture of the  
18 underlying transactions. At one point I think in October he  
19 said that it was actually plaintiffs' MSP's burden to  
20 disaggregate the data. It's not even a close question. It's  
21 his favorite case, *In Re Namenda*, talks about coming up with  
22 the most accurate damages modeling numbers available and to do  
23 that, you get disaggregated data.

24 Same position here, Your Honor. The data exists. We  
25 want to make sure our damages model is robust with the most

1 accurate disaggregated data possible.

2 And honestly, Your Honor, I don't need to disclose an  
3 expert damages model in more detail or preview it to Ms. Kapke.  
4 I don't expect the same from her. They already have our  
5 models, they've already criticized it for the aggregated data  
6 we used, and now we're trying to seek the disaggregated data to  
7 make it even more robust, even though Judge Kugler found it  
8 reliable anyway.

9 JUDGE VANASKIE: Anything else, Ms. Kapke?

10 MS. KAPKE: No, Your Honor.

11 JUDGE VANASKIE: Let's move to the next issue and that  
12 deals with the royalty program records.

13 Why, Mr. Stanoch, aren't the dispensing data  
14 sufficient?

15 MR. STANOCH: Well, again, Your Honor -- and it is  
16 Stanoch, you were right the first time.

17 JUDGE VANASKIE: I go back and forth on that.

18 MR. STANOCH: That's how we say it. I don't know why,  
19 Your Honor. I know it looks like Stanoch.

20 JUDGE VANASKIE: All right, Mr. Stanoch.

21 MR. STANOCH: Your instincts were right on that.

22 So to the question, Your Honor, again, this goes to  
23 ensuring a robust Class Notice Program. All defendants took  
24 issue with the original version of the notice program,  
25 criticizing the strength of the proposed direct notice program.

1 So we're now looking for additional means, consistent with the  
2 23 case law, to ensure that we have direct notice to as many  
3 class members as possible. We have been told on multiple  
4 occasions by retailers that the pharmacy dispensing data  
5 probably won't have many emails. It's really I think beyond  
6 dispute that emails are a much more effective -- cost effective  
7 and efficient way to effectuate a direct notice plan.  
8 Otherwise, we'll be looking at additional millions of dollars  
9 in postage for direct notice to consumer class members. And we  
10 know that emails exist in certain of these retailer defendants'  
11 databases. I saw for the first time in their letter last night  
12 that three of the retailers don't have such databases, the  
13 other six do. And we think that obviously it's relevant to  
14 effectuate notice, that there's no real confidentiality  
15 concerns similar to the issues we've already discussed  
16 regarding the protective order, we're class counsel, we're  
17 trying to make sure we comply with due process, et cetera.

18 In terms of burden, they submitted some declarations  
19 last night. They're very, I'd suggest, vague in terms of  
20 suggesting this may take a lot of work and it may take a little  
21 time for us to query it. We think under the applicable Third  
22 Circuit case law, specifically also the *Larson v. AT&T Mobility*  
23 case from the Third Circuit, that that's insufficient, a  
24 generalized statement of burden. There's no concrete  
25 description of the costs that are involved and the efforts.

1 Simply saying something is hard, *Larson*, the Third Circuit said  
2 that's not good enough. And we don't want any of us to be in a  
3 position, the Court, plaintiffs, class counsel, defendants, in  
4 a situation down the road where we run into a problem with  
5 *Larson*. And I'm always loath to suggest to the Court, any  
6 court, to look at a case, but if Your Honor looks at any case  
7 after this, I'd commend to you the *Larson* case to see some of  
8 the general atmospherics that we're trying to address here and  
9 to nip something down the road now by seeking to get these  
10 email addresses.

11 And in terms of the parade of horrors, if you will,  
12 in terms of their letter briefs and declarations of, oh, some  
13 of the data might be inaccurate or it may be stale or someone  
14 could have made up a fake email address, not only is that very  
15 speculative, Your Honor, but, again, perfection for Rule 23  
16 class notice purposes is not required. And even if when we go  
17 -- go to sign up, you know, any of us today sign up for a  
18 loyalty program with these companies, the very first thing when  
19 I go on the website says enter your email address. So we know  
20 it's there to some extent. And there's no citation in their  
21 letter of last night to which retailer tried to pull which  
22 example from pages 5 and 6 of Ms. Richer's letter, and I didn't  
23 do all of the arithmetic because I was only able to look at it  
24 this morning, but the bottom line is they say in their example,  
25 come up with five other additional emails. Well, if you have

1 millions of consumer class members, Your Honor, if you do the  
2 math, that's going to be a lot of other direct notice contacted  
3 people getting the notice.

4           So we think it's appropriate at this time for them to  
5 pull the information which we know it exists, which they have  
6 not articulated precisely the burden, so we can ensure that the  
7 notice program is robust and is efficient as possible.

8           JUDGE VANASKIE: All right. Ms. Kapke?

9           MS. KAPKE: A lot to say in response there.

10           First of all, I will tell you, I have been on the  
11 phone with a lot of these declarants over the last week, week  
12 and a half, and the burden is very real. I'll tell you the  
13 first thing that we put up was the declaration from Walgreen's  
14 and they talked about the huge amount of computing power that  
15 this would take. They're not exactly sure how to run this  
16 search so it would take a process of them even figuring out how  
17 to do it because they cannot query by NDC or by drug name. So  
18 they've got to come up with this unique script and to do that,  
19 they've got to save all of the dispensing data and then try to  
20 match it up. That will take time away from the daily processes  
21 that they do. You know, they have to submit things to the  
22 prescription drug monitoring databases, PDMD, for purposes of  
23 controlled substances dispensing. They're very concerned that  
24 this is going to affect that process.

25           The second declaration, CVS, talked about how it would

1 take several weeks to write this script. This script does not  
2 exist.

3           The third declaration we submitted was from Rite Aid,  
4 that Rite Aid was the example, they're the only company that --  
5 declaration that one of my clients submitted that hand-query by  
6 NDC. They have very strict limitations on who can do that.  
7 They don't do it but I asked them to specifically so that I  
8 could see if this was even possible. And what I found so  
9 interesting about this was of those 23 email addresses, most of  
10 them, 18 of them, had a mismatch to the person's dispensing  
11 data.

12           And I think Mr. Stanoch's concerns -- dismissiveness  
13 of our concerns about privacy really need to -- we really need  
14 to take a hard look at that. Regulators have been very  
15 concerned about keeping marketing databases separate from  
16 pharmacy dispensing databases, separate from vaccine records,  
17 and we want to make sure that we are only providing the  
18 patient's information.

19           Another declaration that we submitted related to Sam's  
20 Club. Sam's is the only loyalty program at issue for defendant  
21 Walmart here, and they have a membership model. And this is  
22 not hypothetical either. We couldn't pull a sample but Sam's  
23 has a very business-focused approach to gaining and signing up  
24 members. A lot of small businesses will go and they'll have,  
25 for instance, someone sign up and have 16 -- up to 16

1 additional members that they pay for, but because they're  
2 paying for it, the email address associated with that  
3 membership number may be -- or that membership signup may be  
4 something like, you know, purchasing@acme.com. Now, each  
5 individual member is going to have a card that they can then  
6 use at the pharmacy and provide the pharmacy with their email  
7 address, but the membership card, the membership database, may  
8 have purchasing@acme.com.

9           If I am a consumer, I do not want my information going  
10 to my employer. I don't give my email address to the pharmacy  
11 that I fill at because my secretary reads my emails. I do give  
12 a lot of these people email addresses because I don't care if  
13 my secretary sees coupons that I get from CVS and Walgreen's  
14 and all these other companies. But we're talking about  
15 protected health information. And these are not hypothetical  
16 concerns. They're very real concerns about this mismatch. And  
17 I think when you are talking about millions and millions of  
18 prescriptions at issue, the burden is very real to try and  
19 manually match up membership data or loyalty card data and do  
20 the quality control on that.

21           Your Honor had it right when we were talking about  
22 this initially. It's very speculative to think that we're  
23 going to get a lot of additional stuff, if any at all. And  
24 there is a huge burden and notice need not be perfect. We're  
25 going -- if you, as a consumer, went to the pharmacy and gave

1 the pharmacy a piece of contact information, we will produce  
2 that. It's the extra step that we have a real problem with,  
3 Your Honor.

4 JUDGE VANASKIE: All right. Where do things stand  
5 right now with respect to production of contact information  
6 from the dispensing database?

7 MS. KAPKE: We have 60 days from the amended HIPAA  
8 order, which was entered this week, and so we are getting those  
9 pulls as soon as we can. We're not going to sit and wait on it  
10 but as soon as we get them done and ready, we'll get them out  
11 the door. You know, this is a lot of data and our clients are  
12 -- it takes some time, you know. It takes computing power, it  
13 takes time, but we will get it out the door as soon as we can,  
14 Your Honor.

15 JUDGE VANASKIE: Mr. Stanoch, should we wait for the  
16 dispensing data to be produced so you have a sense and your  
17 administrator has a sense of how many email addresses you  
18 receive, how accurate is the contact information that you  
19 receive, before we require production of data from a loyalty  
20 card program database?

21 MR. STANOCH: I appreciate that thought, Your Honor,  
22 but I know that we're under a lot of other countervailing  
23 scheduling pressure. And I'm not pointing the finger at any  
24 particular party of that, it's just the nature of the way the  
25 schedule has come down. And while I understand the allure of

1 that suggestion, Your Honor, on a personal level, I'm not sure  
2 plaintiffs are in a position to agree to that now.

3 JUDGE VANASKIE: Understood.

4 MR. STANOCH: That's all.

5 MS. KAPKE: I think one other important thing to  
6 mention, as a consumer, I have a real concern on a privacy  
7 front about email addresses being used to discuss my  
8 prescriptions. But that being said, what I thought was so  
9 interesting about plaintiffs' submission is they reference the  
10 *Corcoran* case, and a couple other cases, but in the *Corcoran*  
11 case, plaintiffs' own class administrator that they're  
12 proposing to use in this case used what's called an email  
13 append and they used data like the type of data that we're  
14 producing from the pharmacy and dispensing data, mailing  
15 address in particular, maybe a phone number, maybe an email  
16 address, but they used that data and then other sources to come  
17 up with email addresses. I don't know that that's going to be  
18 reliable but it's certainly going to be more reliable and less  
19 burdensome than trying to manually match up loyalty cards,  
20 which are household cards, they are not individualized cards.  
21 And I think before we go down this route of creating new  
22 searches that have never been used before, doing those manual  
23 comparisons, plaintiffs ought to look at their own notice  
24 administrator for a program that they have proposed in other  
25 cases.

1 JUDGE VANASKIE: All right, Mr. Stanoch, what's your  
2 position on that? Let me hear that.

3 MR. STANOCH: Sure. Number one, we were not counsel  
4 in that other case. We are not aware of any effort to try to  
5 get additional -- the email addresses from the loyalty  
6 databases that we're trying to get now. So I think it's really  
7 an apple-to-orange comparison, what happened there, number one.

8 Number two, we're at a certified litigation merits  
9 class in this situation, right, and the defendants and CVS and  
10 the other retailers, they've challenged the adequacy of the  
11 notice program already. It's not an agreed-upon or  
12 non-objected-to situation as may be in other cases. Again, not  
13 faulting anyone but that's the world we're living in.

14 So any sort of arrangements or non-opposition that may  
15 have happened in other cases, that's not this case.

16 I don't need to go tit for tat with Ms. Kapke about  
17 her own subjective views as a consumer. I don't need to  
18 speculate myself about whether a hypothetical consumer might  
19 put in a fake email address in their CVS loyalty card setup.  
20 That's a risk. It could happen with any database anywhere for  
21 anything. So I'm not sure how much hay to make of that.

22 I'd just note again with the *Larson* case, Your Honor,  
23 the defendant put in a declaration, said it's going to take  
24 four or five months and a hundred thousand dollars for us to  
25 pull this data, the Court said don't worry about it, it was

1 reversed.

2 So just from a very broad perspective, I just want to  
3 underscore yet again to Your Honor just so you understand where  
4 we're coming from to make sure all T's are crossed at this  
5 point in terms of our efforts to obtain enough information to  
6 effectuate that direct notice available through reasonable  
7 efforts.

8 JUDGE VANASKIE: Right.

9 MS. KAPKE: I just have to make two quick points.

10 The *Larson* case did not have any indication that there  
11 were other databases at issue, and here we have the pharmacy  
12 database. Plaintiffs are going to get contact information.  
13 They're going to get addresses. Plaintiffs -- I mean this is  
14 all about money is what it is. Plaintiffs could send email --  
15 or could send mailing notice to nearly every single consumer  
16 that's part of the class. Obviously, the consumers that  
17 purchased at non-pharmacy defendants, they can't; but for every  
18 pharmacy defendant, they're going to get an address. Some may  
19 be undeliverable but that's just the nature of this program.  
20 But there is a meaningful difference between what is in  
21 dispensing data and loyalty data.

22 Pharmacy data is verified data. People can't use fake  
23 names, people can't use the wrong date of birth, or they won't  
24 get their prescription. These are doctors' ordered  
25 prescriptions. It is very real that households share loyalty

1 databases; people put in -- you know, the example we were  
2 joking around with was bugsbunny@yahoo.com, but people don't  
3 provide real email addresses when they sign up. In fact, some  
4 of the -- in the declarations we talked about the fact that,  
5 you know, before 2015, for instance, you could just -- at CVS,  
6 you could just walk in the store and get a card. So many of  
7 the loyalty card swipes aren't even going to have information  
8 with them. Walgreen's said that only 25 percent of loyalty  
9 members have ever provided an email and that email address has  
10 never been verified. But in contrast, you are going to have a  
11 name and address in nearly every case of the verified  
12 prescription database.

13           Plaintiffs have not cited a single case, we have  
14 looked, we have not found a single case where one database with  
15 the true source of that data was insufficient and that some  
16 newly created, almost phonebook search was required. We're  
17 giving plaintiffs what the script -- the information associated  
18 with the prescription that's in our dispensing databases.  
19 That's the true source of this. That is exactly what  
20 plaintiffs need to effectuate direct notice, and they didn't  
21 propose any form of direct notice in the initial class notice  
22 proposal. There was not a single form of consumer direct  
23 notice. It was all advertising. So it is an overreaction, as  
24 Your Honor indicated when we first talked about this.

25           JUDGE VANASKIE: All right. Anything else, Mr.

1 Stanoch?

2 MR. STANOCH: I think enough has been said and  
3 Your Honor appreciates the issues.

4 JUDGE VANASKIE: I think both sides have argued this  
5 persuasively. I am going to take it under advisement and will  
6 issue a decision promptly because I know we have to move this  
7 matter along. Thank you very much for both the briefing and  
8 your oral arguments today.

9 And unless there's any other business, we'll be  
10 adjourned.

11 Go ahead, Mr. Stanoch.

12 MR. STANOCH: Yes, Your Honor, one unrelated  
13 housekeeping matter for next week, just because it was brought  
14 to my attention -- in two weeks. There is a July 6th hearing  
15 on the wholesaler issues, Your Honor may recall.

16 JUDGE VANASKIE: Yes.

17 MR. STANOCH: That call was originally scheduled to be  
18 via Zoom. Then this call was scheduled for the same day and  
19 then a docket entry said this call with the retailers would be  
20 live on July 6th. Nothing ever said with the wholesalers. So  
21 right now I think both sides, the wholesalers and plaintiffs,  
22 think July 6th is still on Zoom, which we're fine either way,  
23 we just want to make sure that's true because it was odd that  
24 the retailer one was rescheduled to live but the wholesalers  
25 wasn't. We just want to make sure we're on the same page.

1 JUDGE VANASKIE: We will leave that July 6 argument  
2 session via Zoom.

3 MR. STANOCH: Excellent.

4 JUDGE VANASKIE: It's just a lot easier for everyone.  
5 It's good to see everybody in person but this is easier. So  
6 that will stay by Zoom and I'll probably see you all on the 6th  
7 of July and see you then.

8 Enjoy the Independence Day weekend.

9 MR. STANOCH: Thank you. You as well, Your Honor, and  
10 everyone else.

11 MS. KAPKE: Thank you.

12 (The proceedings concluded at 11:31 a.m.)

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14 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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16  
17 I certify that the foregoing is a correct transcript  
18 from the record of proceedings in the above-entitled matter.

19  
20 /S/ Camille Pedano, CCR, RMR, CRR, CRC, RPR June 23, 2023  
21 Court Reporter/Transcriber Date  
22  
23  
24  
25